TAN CHIN NGOH v. TAN CHIN TEAT, TAN CHIN HEAN AND ANOTHER.

[Original Civil Juris. (Worley, J.) November 2, 1946]

Settlement — Trust to apply income from leasehold properties for a defined period for maintenance and upkeep of temple in China and for the performance of Sin Chew worship therein and after that period to hold properties on trust for the Settlor, his executors administrators or assigns — Whether trust void for repugnancy — Whether period of limitation void for remotenes — Trusts partly charitable and partly non-charitable — Whether trusts are enforceable — Whether law of Colony or law of China applicable to determine validity of trusts — Private International Law.

This was an application for the construction of an indenture made the 26th of October 1894 between one Lim Loh the vendor, one Tan Yeok Nee (hereinafter called the Settlor) and Tan Yeok Nee and Tan Tee Kah (hereinafter called the Trustees) whereby certain leasehold properties in Singapore were conveyed to the trustees (the purchase money being provided by the Settlor) to hold upon the following trusts:—

(1) Upon trust during the life of the settlor to allow him to receive the rents income and profits of the properties and after paying thereout the outgoings payable in respect of the premises and the expenses of keeping the buildings in repair to apply the balance of such rents in such manner as he in his absolute discretion should think fit for the maintenance and upkeep of or otherwise in connection with the Joss House or Temple known as Tok Kheng Tong erected by the settlor in the village of Saleng Tan near Swatow in the Empire of China.

(2) After the death of the settlor upon trust during the period following namely during the life of Her Majesty Queen Victoria and the lives of her children grandchildren and great-grandchildren now in being and during the lives and life of the survivors and survivor of them and the period of twenty-one years after the death of such survivor to receive the rents and profits (and after provision for the usual powers to manage, etc.) to remit the residue of such rents once a year to the person for the time being having charge of the said Temple or Joss House to be applied by such person for the maintenance and upkeep of the Temple or Joss House and for the due performance therein of the ceremonies known among the Chinese as Sin Chew Kee Sin in memory of the settlor and of his relatives or others whose Sin Chew may from time to time be kept in the said Temple or Joss House.

(3) And after the expiration of the said period the Trustees to hold the premises for the settlor, his executors, administrators or assigns. Provided that during his life the settlor should have the right to exercise the statutory power of appointing new trustees of the indenture.

During his lifetime the settlor in exercise of the power of appointment appointed two other persons to be trustees in his place and subsequently other trustees were appointed, with the result that the 1st and 2nd defendants became trustees of the indenture.

The settlor died on the 21st May 1902 and by his Will he directed that his residuary estate should be divided among his ten named grandsons with the provision that on the youngest of the said grandsons attaining the age of twenty-one years the residuary estate should be converted into money and divided among them. The plaintiff in this case was one of the named grandchildren and as such entitled to a share in the residuary estate.

The third defendant was the sole surviving executor of the Will.

The plaintiff applied by summons for the determination inter alia of the following questions:—

(1) Whether according to the true construction of the abovenamed indenture the trusts to apply the rents income and profits of the properties therein described and the period therein mentioned to apply such rents income and profits for the maintenance and upkeep of or otherwise in connection with the Joss House or Temple known as Tok Kheng Tong and for the purpose therein of Sin Chew Kee Sin ceremony were void for repugnancy.

(2) Whether according to the true construction of the said indenture the settlor was absolutely and beneficially entitled to the properties described therein.

(3) Whether the period of limitation mentioned in the said indenture was void for remoteness.

(4) Whether the trusts mentioned in paragraph 1 were enforceable.

Held, (1) that the trusts were not void for repugnancy as the intention of the settlor in creating the third trust was not to give an absolute interest in the property to the settlor, but was to make a disposition of the property to take effect at the expiration of the limited and consecutive periods for which the first and second trusts were created;

(2) that there was a valid trust of the income of the property for a charitable purpose, namely, the upkeep of a Temple, during the life of the testator, and that the first trust was not invalid merely because the settlor had an absolute discretion to apply the income as he should think fit for the maintenance of or otherwise in connection with the temple;

(3) that although the trust for the second period contained a charitable gift made conditional upon a future event that event was a certain one, namely, the death of the settlor, and that therefore it was not void for remoteness;

(4) that as the trusts were impressed upon leasehold property in the Colony, the validity of the trusts must be determined by the laws of the Colony;

(5) that the trust for the second period was partly charitable and partly non-charitable and that in such cases, where the property impressed with the trust is certain, the trust does not fail but the Court will in default of appointment by the trustees, apportion the fund between the charitable and the non-charitable objects equally.

(6) that there was no evidence of any practical difficulty in making the apportionment in this case and that therefore the trust was **prima facie** enforceable.

Cases referred to.

(1) *In re Hadjee Ismail bin Kassim deceased, Mohamedeen & others v. Hussain Beebee binte Shaik Ali Bey* (1911) 12 S.S.L.R. 74.

(2) *Tan Jiak Kim v. Tan Jiak Poh and others* Suit No. 239 of 1915. (unreported).

(3) *Forbes v. Git* (1922) 1 A.C. 256.

(4) *Waldo v Caley* (1809) 16 Ves. 206.

(5) *Horde v. Suffolk* (1833) 2 Myl. and K. 59.

(6) *Powerscourt v. Powerscourt* (1824) 1 Moll. 616.

(7) *Ng Eng Kiat v. Goh Lai Mui and others* (1940) S.S.L.R. 78; (1940) 9 M.L.J, 181.

(8) *Freke v. Lord Carbery* 16 Eq. 461.

(9) *In re Khoo Cheng Teow* (1932) S.S.L.R. 226; (1933) 2 M.L.J. 119.

(10) *Attorney-General v. Thirpooree Soonderee* 1 Kyshe 377.

(11) *In re Low Kim Pong's Trust Settlements* (1938) S.S.L.R. 144; (1938) 7 M.L.J. 119.

(12) *In re Choo Eng Choon* (1908) 12 S.S.L.R. 120.

(13) *Ewen v. Bannerman* (1830) 2 Bow. & Cl. 74.

(14) *Hunter v. Attorney-General* (1899) A.C. 309.

(15) *In re Clarke* (1923) 2 Ch. 407.

C. J. Koh for the plaintiff.

N. A. Mallal for the 1st and 2nd defendants.

The facts and arguments sufficiently appear from the judgment.

Cur. Adv. Vult.

Worley, J. :—This was an application for the construction of an indenture made the 26th of October 1894 between Lim Loh the vendor, Tan Yeok Nee hereinafter called the settlor, and Tan Yeok Nee and Tan Tee Kah hereinafter called the trustees, whereby certain leasehold properties in Singapore were conveyed to the trustees (the purchase money being provided by the settlor) to hold upon the following trusts :—

(1) Upon trust during the life of the settlor to allow him to receive the rents income and profits of the properties and after paying thereout the outgoings payable in respect of the premises and the expenses of keeping the buildings in repair to apply the balance of such rents in such manner as he in his absolute discretion should think fit for the maintenance and upkeep of or otherwise in connection with the Joss House or Temple known as Tok Kheng Tong erected by the settlor in the village of Saleng Tan near Swatow in the Empire of China.

(2) After the death of the settlor upon trust during the period following namely during the life of Her Majesty Queen Victoria and the lives of her children grandchildren and great grandchildren now in being and during the lives and life of the survivors and survivor of them and the period of twenty-one years after the death of such survivor to receive the rents and profits and (after provision for the usual powers to manage, etc.) to remit the residue of such rents once a year to the person for the time being having charge of the said Temple or Joss House to be applied by such person for the maintenance and upkeep of the Temple or Joss House and for the due performance therein of the ceremonies known among the Chinese as Sin Chew Kee Sin in memory of the settlor and of his relatives or others whose Sin Chews may from time to time be kept in the said Temple or Joss House.

(3) And after the expiration of the said period the Trustees to hold the premises upon trust for the settlor, his executors, administrators or assigns. Provided that during his life the settlor should have the right to exercise the statutory power of appointing new trustees of the indenture.

During his lifetime the settlor in exercise of this power of appointment appointed two other persons to be trustees of the indenture in his place and subsequently other trustees were appointed as set out in the plaintiff's affidavit of the 9th of September 1941 so that to-day the 1st and 2nd defendants are the present trustees of the indenture.

The settlor died on the 21st May 1902 and by his will he directed that his residuary estate should be divided among his ten named grandsons with the provision that on the youngest of the said grandsons attaining the age of twenty one years the residuary estate should be converted into money and divided amongst them. As the will took effect from the date of death the distribution must have been made not later than 1924 or 1925. The present plaintiff is one of the named grandchildren and as such entitled to a share in the residuary estate.

The 3rd defendant is the sole surviving executor of the will.

The plaintiff in this summons applies for the determination of the following questions :—

(1) Whether according to the true construction of the abovenamed indenture the trusts to apply the rents income and profits of the properties therein described and the period therein mentioned to apply such rents income and profits for the maintenance and upkeep of or otherwise in connection with the Joss House or Temple known as Tok Kheng Tong and for the

purpose therein of Sin Chew Kee Sin ceremony are void for repugnancy.

(2) Whether according to the true construction of the said indenture the settlor was absolutely and beneficially entitled to the properties described therein.

(3) Whether the period of limitation mentioned in the said indenture is void for remoteness.

(4) Whether the trusts mentioned in paragraph 1 hereof are enforceable.

(5) That, if necessary, an enquiry be directed as to who are the persons now entitled to share the properties described in the said indenture.

(6) For an order for an account of the rents and profits collected by the 1st and 2nd defendants as trustees under the said indenture of the properties comprised therein and of the application of the said rents and profits.

(7) That the costs of this application be provided for.

Before considering these matters I think it advisable to recall the history of this application. The summons was taken out by Messrs. Johannes and Sammy, solicitors for the plaintiff, on the 9th of September 1941. On the 22nd of September 1941, Aitken J. in Chambers appointed the plaintiff to represent the ten grandsons (including the plaintiff himself) named in the will of the settlor. This representation order has never been taken out. The rest of the summons was adjourned into Court for argument and came before me on the 2nd and 3rd of February 1942. Mr. Johannes appeared for the plaintiff, Mr. R. C. H. Lim for the 1st and 2nd defendants and Mr. Isaac Hoahing for the 3rd defendant. I reserved judgment but, in the circumstances of the time other matters occupied my attention, and before judgment was delivered Singapore capitulated and I ceased to function as a Judge. Mr. Johannes died in internment and Mr. Isaac Hoahing disappeared during the Japanese occupation and it is not known whether he is alive or dead. When I resumed sittings in this Court in June 1946 Mr. C. J. Koh, the plaintiff's present solicitor, asked for judgment. On reading over my notes of the argument and the Court file it appeared to me that, as the matter concerned a public charity, the Attorney-General might wish to be joined and also that I might be bound to follow the case of In re *Haji Ismail*[1] which had not been referred to in the course of the argument in 1942. I so informed Mr. Koh and requested him to communicate with the Attorney-General and with Messrs. Mallal and Namazie who are now solicitors for the 1st and 2nd defendants. I am informed by Mr. Koh that the Attorney-General has been notified of these proceedings but does not wish to be joined. Mr. Mallal having asking for an opportunity for further argument, the summons came before me again on the 11th and 15th October 1946. Mr. C. J. Koh appeared for the plaintiff and Mr. N. A. Mallal for the 1st. and 2nd defendants. The 3rd defendant was not represented or present and counsel have informed me that they have tried to get in touch with him without success. He is cited as the only surviving trustee of the settlor's will and at the hearing in 1942 Mr. Hoahing associated himself with Mr. Johannes' arguments. I consider therefore that I can safely proceed in his absence.

One further preliminary point remains to be mentioned. At the hearing on 2nd February 1942 Mr. Lim produced the affidavit of the 2nd defendant and was permitted to read it subject to it being sworn. The affidavit is in the file but has not yet been sworn. It however deals only with questions of fact as to the continued existence of the Temple in the village of Saleng Tan, remittances of money and accounts.

I can now pass on to consider the question in the summons. Taking the first two in conjunction the plaintiff contended that the effect of the trust created for the third trust period, namely the trust for the settlor, his executors, administrators or assigns, was to give the settlor an absolute interest in the property, that it is repugnant to such a gift to say that the donee shall enjoy it only many years after he has been dead and that on the proper construction of the deed the intervening estates must be deleted, the settlor being deemed to have taken absolutely and immediately; and, he being now dead the property falls into his residuary estate to be distributed as directed by the will. This construction if adopted, will in effect nullify the deed and is therefore not one which the Court will readily adopt.

Mr. Johannes relied upon the judgment of the Court of Appeal of the Straits Settlements in the unreported case of *Tan Jiak Kim v. Tan Jiak Poh and others*[2] and supported this by reference to a number of English cases in which it was held that a condition inconsistent with a gift is void.

In *Tan Jiak Kim v. Tan Jiak Poh*[2] a testator bequeathed his residuary personal estate to trustees as a "reserve fund" upon trust for his four named sons in equal shares and directed that the reserve fund should become divisible and payable at the termination of twenty-one years from the date of death of the survivor of his wife, his said four sons, his daughters and his three named grandsons. It will be at once obvious that the four sons, in whose favour the trustees were directed to stand possessed, could never

enjoy possession nor could the fund ever become divisible among them or any of them as the date fixed for payment and distribution must be at least twenty-one years after the death of the last survivor of them. The will then directed a complicated scheme of periodic accumulations and distributions of income, the main feature of which was that the sons were to enjoy the income for their lives. There were further directions to cover the eventuality of a son dying before his share should become due and payable but these are immaterial. On a summons asking for construction of the will, Earnshaw J. held that after a period of twenty-one years from the death of the testator, the four named sons were entitled to take the residue absolutely share and share alike and he struck out all that was repugnant to that declaration. This judgment was upheld on appeal. Earnshaw J's judgment is in the Court file of the suit but there is no record of the appeal. Mr. Johannes however produced from his own files a copy of the judgment of Sir John Bucknill C.J. in the Court of Appeal, and Mr. Lim raised no objection to its being used. Counsel agreed that the Court of Appeal was unanimous in dismissing the appeal and it seems probable that Sir John Bucknill's judgment was the only written one, the other judges concurring. Sir John Bucknill held that on the proper construction of the will there was an absolute gift to the trustees of the reserve fund in trust for the four sons, that the postponement of enjoyment was repugnant and must be deleted, and the sons must therefore take at once.

I would accept this decision as binding upon me if relevant to the present case but I do not think it is. Like the English cases to which I was referred it is a case upon the construction of a will whete there was an absolute gift followed by conditions which were held to be repugnant. But the matter before me is the construction of a deed and the principle to be applied, if there is a repugnancy in a deed was declared by the Privy Council in the case of *Forbes v. Git*[3] per Lord Wrenbury in the following terms :—

> If in a deed an earlier clause is followed by a later clause, which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant and the earlier clause prevails.....But if the later clause does not destroy but only qualifies the earlier, then the two are to be read together and effect is to be given to the intention of the parties as disclosed by the deed as a whole.

So that were I to hold that there is a repugnancy in this deed, that would not advance the plaintiff's case for it is the last clause which would have to be struck out.

But in my view there is no repugnancy. The first and second trusts were created for limited and consecutive periods and it was necessary for the settlor to make a disposition of the property to take effect at the expiration of the second of those periods if he wanted the property to revert to the use of his estate. That in my view was the settlor's intention in creating the third trust period and that is the effect of the words used. I therefore answer the first two questions in the summons in the negative.

The third question is whether the period of limitation mentioned in the indenture is void for remoteness. According to my notes Mr. Johannes argued that the trust for the second period was void because there is a gap and it doesn't begin till after the death of the settlor and that this transgressed the rule against perpetuities. He admitted that he had no direct authority for it. Mr. Koh suggests that Mr. Johannes may have intended to say that it was void for remoteness and referred me to the passage in *Jarman* on Wills 7th Edition Volume I at page 197 where the rule is stated as follows : "It must however be remembered that if a charitable gift is not immediate but is made conditional upon a future and uncertain event it is subject to the same rules and principles as any other estate depending on its coming into existence upon a condition precedent. If the condition is never fulfilled the estate never arises. If it is so remote and indefinite as to transgress the limits of time prescribed by the rules of law against perpetuities the gift failed ab initio." But this charitable gift was made conditional upon a future but certain event, namely, the death of the settlor. The deed spoke from delivery and during the life of the settlor there was a valid trust of the income for a charitable purpose, namely the upkeep of the temple.

It was suggested in the course of the argument that the first trust was invalid because the settlor had an absolute discretion to apply the income as he should think fit for the maintenance or otherwise in connection with the Temple. English decisions lend no support to this view, see *Waldo v. Caley* [4], *Horde v. Suffolk*[5] and *Powerscourt v. Powerscourt*[6], and I think the rule to be deduced from these and similar cases is correctly stated in *Tudor* on Charities 5th Edition at page 183 and 184 as follows :—"Where income for a limited period, as during the lifetime of a particular person, is directed to be paid to a particular person to be applied at his discretion for general or special charitable purposes the Court does not take upon itself the execution of the trust. Accordingly, in cases of

this kind, no scheme is directed but the Court gives liberty to any of the parties to apply as there may be occasion." A trust such as this is therefore a valid charitable trust and the Court will exercise such control as is necessary to ensure the due performance of it.

Accordingly I answer the third question in the negative.

The fourth question is whether the trusts mentioned in the first question are enforceable. Mr. Mallal contended that the objects of the second trust are to be performed in China, and that whether they are valid trusts or not depends on the law of China; therefore though the Courts of the Colony will see that the trustees here carry out the trusts by managing the property and remitting the balance of the income to the proper person in China, yet they cannot enquire whether the objects on which the money is to be spent in China are valid according to our law. He referred to the case of *Ng Eng Kiat v. Goh Lai Mui and others*[7] but that case does not assist his argument. There, the trust being impressed upon property situated in China and the limitations being permitted by the law of that country, it was held that the fact that such limitations would be illegal by the law of the Colony is immaterial. But the present case is the converse of that and falls within the rule in *Freke v. Lord Carbery*[8] that the validity of a testamentary disposition of English leasehold is governed by the law of England. In that case, the proceeds of sale of a leasehold house in London were directed by the will of a testator domiciled in Ireland to be held upon trusts which infringed the English rule against perpetuities, the Thelluson Act not applying to Ireland. The rule must equally apply to the present case where the trusts are impressed upon leasehold property in the Colony, the income from which is to be applied to the purposes of the trust. I hold therefore that the validity of the trusts must be determined according to the laws of the Colony.

The rule against perpetuities is part of the law of the Colony but the period limited does not infringe that rule. It is now well settled law in the Colony that a trust for sin chew ceremonies is not a charity but is not void as being for superstitious uses and is valid if it does not offend against perpetuities (see *In re Khoo Cheng Teow*[9]). It is also well settled that a trust for the upkeep of a temple or joss house is a trust for the advancement of religion and therefore a good charitable trust, see *Attorney-General v. Thirpooree Soonderee*[10] and *In re Low Kim Peng's Trust Settlements*[11]. It follows therefore that the trust for the second period is partly charitable and partly non-charitable.

It was contended for the plaintiff that the trust was void for uncertainty, for the reason that, although the property impressed with the trust and the objects of the trust are certain, there is uncertainty as to the quantum which is to be applied to each of the different object; that is, how much to maintenance of the temple, how much to the sin chews or how much to each person's sin chew. In the case of *Re Hadjee Ismail bin Kassim decd.*[1], referred to above, it was held that the objects of a gift of income being partly charitable and partly not, the whole gift, including the gifts to charitable objects, failed for uncertainty as to the subject matter of the gift. This was a decision of Sir William Hyndman-Jones, C.J., sitting in original jurisdiction and therefore a decision of a court of co-ordinate jurisdiction which has stood for nearly forty years and which, though not absolutely binding on me, ought to be followed in the absence of strong reasons to the contrary. (The headnote on this point in *In re Choo Eng Choon*[12] is misleading: see XII S.S.L.R. 120 per Law Ag. C.J. at p. 161). Having carefully considered *Hadjee Ismail's case* I have come to the conclusion that such a reason exists in this instance and have decided not to follow it.

In *Hadjee Ismail's case*, a testator by his will had directed that one third share of his property be held upon trust for a named period (which did not infringe the rule against perpetuities) as a "Wakaf or property set apart for charitable purposes" and he further directed that the income should from time to time be applied to five specified purposes, some of which were held to be charitable and some non-charitable. The plaintiffs contended that the charitable purposes thereupon failed for uncertainty, the quantum being indefinite. The Attorney-General having argued that a charitable bequest never failed for uncertainty, the learned Judge admitted this principle as applicable to uncertainty in the object but said :—

> But I find it laid down in the Encyclopaedia of the Laws of England 2nd Edition, Volume 2 at page 685 in the following terms: "If the amount is uncertain or if there is not a clear charitable intention expressed, the gift will fail".

He noted that the cases cited in the Encyclopaedia for that proposition were cases in which there was or was not a clear charitable intention expressed, the amount in each case being definite, and quoted a passage in the chapter on Incomplete Gifts in *Tyssen* on "The Law of Charitable Bequests", in support of the proposition that if the amount is uncertain the gift

fails. He also referred to *Ewen v. Bannerman*[13]. He therefore held that four of the gifts failed, two because they were neither charitable nor certain, and two because, although charitable, the amount in each case was left uncertain. The fifth gift was declared valid because the testator had directed that the amount should be at the discretion of the trustee.

With great respect to the learned Judge, I am obliged to conclude that he failed to distinguish between cases where the whole amount of the gift is left uncertain and those where the whole amount, or the property impressed with the trust, is certain but the apportionment between different objects is uncertain.

The complete proposition in the Encyclopaedia to which he refers reads as follows :—"If a testator has not completely expressed his intention, but has defined the property or amount intended to be given, and it is clear that he intended it for some charitable purpose or purposes, effect will be given to the gift; but if the amount is uncertain or there is not a clear charitable intention expressed, the gift will fail." To my mind, this passage clearly refers only to cases where the property impressed with the trust or the total amount of the gift is uncertain.

The Chapter on "Incomplete Gifts" in *Tyssen's* "Law of Charitable Bequests" has apparently been rewritten in the 2nd Edition (1921) as Chapter X "Indefinite and Incomplete Charitable Gifts" and the passage most nearly resembling that quoted by Sir William Hyndman-Jones is the paragraph on "Blanks in wills" on page 129 where *Ewen v. Bannerman* is also cited. These passages also clearly refer only to cases where the property is left uncertain and in the same Chapter at page 124, I find the following proposition cited from *Hunter v. Attorney-General*[14] "where the trustees have a discretion to apportion between charitable objects and definite and ascertainable objects non-charitable the trust does not fail; but in default of appointment by the trustees the Court will divide the fund between the objects charitable and non-charitable equally".

In *Halsbury's* "Laws of England" 2nd Ed. Vol. 4, paragraphs 223 and 224, the law as stated is that if the amount of a gift purporting to be made in favour of a charity cannot be ascertained the gift fails, but when a testator gives funds to be applied partly for objects which are charitable and partly for objects which are not charitable, but does not specify the proportions in which the funds are to be applied for the different objects, the Court will make an apportionment. I refer also to paragraph 228 of the same volume and to *Tudor* on Charities 5th Edition on "Certainty of the Subject-matter" at page 59 et. seq. and on "Charitable and other objects in unascertained proportions" at page 101. See also the observations of Romer J. in *In re Clarke*[15]. These are unanimous and authoritative statements of the law which carry great weight and which I think I should follow rather than the decision in *Hadjee Ismail's case.*

I have considered whether the application of the rule of apportionment to this case is affected by the fact that the objects are to be performed in China and that there may be practical difficulties in making the apportionment effective or in making it at all. But I have no evidence that there is in fact any such difficulty. It is, I conceive, primarily the duty of the trustees to see to the apportionment of the income and it is only if they fail to do so or cannot do so that the Court will be called upon. I do not think the applicability of the rule can be affected by the supposition of difficulties which may never have existed or exist.

Accordingly I answer the fourth question in the affirmative. This determination is of course, entirely without prejudice to the question, whether as a matter of fact, the trusts have failed by reason of the non-existence of the Temple or otherwise. There is no evidence before me on that and no argument has been addressed to me.

In view of these findings the enquiry asked for in the fifth question is unnecessary, it being agreed by all parties that the period limited for the second trust has not yet run out.

I will hear counsel on the sixth and seventh questions in the summons.

Order accordingly.